88-306

No. ———

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, ETC., LOCAL 3, AFL-CIO,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD

and

JOHN DEKLEWA, THEODORE DEKLEWA and ROBERT DEKLEWA, d/b/a JOHN DEKLEWA & SONS and/or JOHN DEKLEWA & SONS, INC.,
Respondents.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Congress determined in enacting § 8(f) of the National Labor Relations Act, as amended, that National Labor Relations Board conducted representational elections "are not feasible" in a "large segment" of the construction industry and that in the normal case the signatory union to a § 8(f) pre-hire agreement permitted by § 8(f) will be the majority representative of the employees who work under the agreement. The question presented by this cross-petition is:

Whether, in the face of these congressional determinations, the NLRB's adoption of a *per se* rule requiring a construction industry union which is signatory to a § 8(f) agreement to prevail in a Board-conducted representation election (or as an equivalent to secure voluntary employer recognition as the majority representative of the employer's current employees) in order to enjoy full exclusive bargaining representative status, is contrary to law? *

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* The parties to this proceeding are International Association of Bridge, Structural and Ornamental Iron Workers, etc., Local 3, AFL-CIO, John Deklewa, Theodore Deklewa and Robert Deklewa, d/b/a John Deklewa & Sons and/or John Deklewa & Sons, Inc., and the National Labor Relations Board.

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Respondents.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

International Association of Bridge, Structural and Ornamental Iron Workers, etc., Local 3, AFL-CIO, ("the Union"), petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in *International Ass'n. of Bridge, Etc., Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. Nos. 87-3121, 87-3192 & 87-3231; April 12, 1988). This cross-petition is conditioned on the granting in whole or in part of the petition for a writ of certiorari in *John Deklewa, et al. v. NLRB et al.*, Supreme Court No. 88-70, which seeks

review of the same judgment and which was served on counsel for the Union on July 11, 1988.[1] The Union is filing contemporaneously herewith a brief in opposition to the *certiorari* petition in No. 88-70; in the event that petition is denied, the Union requests the Court to deny this petition as well.

STATEMENT OF THE CASE[2]

This case proceeded on a stipulation of facts (Pet. App. 1a-15a)[3] which the National Labor Relations Board fairly summarized in its decision herein. We therefore state the facts by reprinting that summary (omitting only the facts relevant to establishing the Board's jurisdiction and a discussion of a grievance filed under the collective bargaining agreement here that is no longer relevant):

> . . . John Deklewa & Sons, Inc., a Pennsylvania corporation, has an office in Bridgeville, Pennsylvania, where it is engaged in the business of heavy construction. . . . John Deklewa & Sons, a partnership with an office at the same location as the . . . Corporation, is engaged in the construction of commercial and industrial buildings. . . .
>
> • • • •
>
> The Iron Workers Employer Association of Western Pennsylvania, Inc. (the Association) is an organization composed of approximately 35 construction industry employers. The Association represents

[1] The citations to the opinions below, the basis of this Court's jurisdiction and the pertinent statutory provisions are set out at pp. 1-2 of the *certiorari* petition in No. 88-70, and are therefore not repeated here.

[2] With a minor change in the first paragraph, this statement of the case is taken verbatim from the statement in the Brief In Opposition For Respondent Union in the connected case of *John Deklewa, et al. v. National Labor Relations Board, et al.*, No. 88-70.

[3] "Pet. App." refers to the appendix to the *certiorari* petition in the connected case of *John Deklewa, et al. v. NLRB, et al.*, No. 88-70.

its employer-members in negotiating and administering collective bargaining agreements with the [International Association of Bridge, Structural and Ornamental Iron Workers, Local 3, AFL-CIO]. The Association and the Union have been parties to successive collective bargaining agreements for at least the past 30 years, the most recent relevant contract having been effective 1 June 1982 through 31 May 1985.

On 24 June 1960 the [Employer] entered into a prehire agreement with the Union under which the [Employer] agreed to be bound by the provisions of the contract between the Association and the Union. For the next 20 years the [Employer] executed and adhered to the successive Association-Union collective-bargaining agreements. The [Employer] did so as a separate entity and not by virtue of any membership in the multiemployer group.

In June 1980 the [Employer] became a member of the Association, and subsequently executed the 1982-1985 agreement with the Union. This contract had a 60-day notice of termination provision, an exclusive hiring hall provision, and a union-security clause. On 21 September 1983 the [Employer] timely resigned its membership in the Association. The Association has not opposed this resignation, but it considers the [Employer] bound to the terms of the 1982-1985 agreement. On the same date that it resigned from the Association, the [Employer] notified the Union that it was repudiating the contract and withdrawing recognition. The [Employer] was not engaged in any construction projects on 21 September 1983 on which it directly employed employees covered by the 1982-1985 labor agreement, and from that date until the 3 May 1984 date of the parties' stipulation the [Employer] has not directly employed any such employees.

By letter dated 27 September 1983, the Union objected to the [Employer's] repudiation of the agreement and withdrawal of recognition . . . .

The parties stipulated that from June 1960 until its September 1983 repudiation: the [Employer] relied exclusively on the Union's hiring hall for its ironworkers; all these employees were union members; they were hired on a jobsite-to-jobsite basis; and the [Employer] adhered to the terms of the applicable collective-bargaining agreement on all its projects. On many of these projects the [Employer] did not hire ironworkers directly, but used subcontractors who were signatory to the Union-Association agreement.

At all times material here, approximately 30 of the 35 members of the Association have, on a continual and regular basis, been engaged in projects requiring the direct employment of employees covered by the Association-Union agreement. These employees have been members of the Union or have adopted the Union as their collective-bargaining representative. A majority of such employees moved from job to job and from employment by one member of the Association to another in response to work opportunities. Between 1 June 1982 and the date of the stipulation here, the [Employer] engaged in three projects on which it directly employed employees covered by the 1982-1985 agreement, the last of which was completed in April 1983. [Pet. App. 53a-56a.]

On these facts the Board found that

> the [Employer] violated Section 8(a)(5) and (1) by repudiating the 1982-1985 contract with the Union and withdrawing recognition during the contract's term. The [Employer] voluntarily entered into an 8(f) relationship with the Union and signed the contract. This contract was binding, enforceable, and not subject to unilateral repudiation by the [Employer]. Because the contract has expired, however, the Union enjoys no continuing presumption of majority status, and the [Employer] is not compelled to negotiate or adopt a successor agreement

> based solely on the existence of an 8(f) relationship. In addition, the Union is not entitled to engage in any coercive conduct, including strikes and picketing, to force the [Employer] to execute a successor 8(f) agreement. [Pet. App. 96a.]

These findings were predicated on the Board's decision to abandon its then-current approach to § 8(f) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(f)—the provision which permits employers and unions in the construction industry to enter into collective bargaining agreements even though the union's majority status is not established prior to doing so—and to instead "apply the following principles in § 8(f) cases":

> (1) a collective-bargaining agreement permitted by Section 8(f) shall be enforceable through the mechanisms of Section 8(a)(5) and Section 8(b)(3); (2) such agreements will not bar the processing of valid petitions filed pursuant to Section 9(c) and 9(e); (3) in processing such petitions, the appropriate unit normally will be the single employer's employees covered by the agreement; and (4) upon the expiration of such agreements, the signatory union will enjoy no presumption of majority status, and either party may repudiate the 8(f) bargaining relationship. [Pet. App. 58a-59a.]

On cross petitions for review filed by the Employer and the Union, and the NLRB's petition for enforcement, the Court of Appeals affirmed the Board in all respects.

REASONS FOR GRANTING THE WRIT

In its decision in this case, the National Labor Relations Board stated two basic rules for implementing § 8(f) of the National Labor Relations Act, as amended, the provision permitting employees and unions in the construction industry to enter into collective bargaining agreements even though the union's majority status is not established prior to doing so:

> (1) a collective-bargaining agreement permitted by Section 8(f) shall be enforceable through the mechanisms of Section 8(a)(5) and Section 8(b)(3); . . . and [2] upon the expiration of such agreements, the signatory union will enjoy no presumption of majority status, and either party may repudiate the 8(f) bargaining relationship. [Pet. App. 58a-59a.]

The Employer's *certiorari* petition in *John Deklewa, et al. v. NLRB, et al.*, No. 88-70, challenges the first of these rules. We submit, for the reasons developed in our brief in opposition there, that review by this Court of the Board's present approach to § 8(f) is premature at this nascent stage in the process of litigating elucidation.

In this conditional cross-petition, we submit further that if the Court determines that the time is ripe to consider the status and effect of § 8(f) agreements, that consideration should include not only the Board rule that governs while the agreement runs its limited term but also the rule that governs when the agreement terminates; the inevitable next stage in a continuous process.

Given the inextricable interrelation between the two Board rules, we believe that the Court would clearly benefit in its deliberations by considering both together. And we believe, too, that in terms of judicial efficiency such an approach is superior to the alternative of considering the rule governing § 8(f) agreements during their term on its own. These points seem to us largely self-evident and we therefore do not belabor either one.

It is our position, moreover, that while the Board rule challenged by the Employer's *certiorari* petition in No. 88-70 is entirely correct, the related Board rule we call into question here is entirely wrong. The second part of that proposition is, to be sure, not self-evident and at this juncture we therefore outline our supporting argument.

Under the narrowest standard for judicial review of agency action—the "arbitrary and capricious" standard

—the agency's ruling must be "*rational*, based on consideration of the relevant factors and within the scope of the authority delegated to the agency by the statute." *Motor Vehicle Mfrs. Assn. v. State Farm Mut.*, 463 U.S. 29, 42 (1983) (emphasis added). The Board rule that "upon the expiration of § 8(f) agreements, the signatory union will enjoy no presumption of majority status, and either party may repudiate the 8(f) bargaining relationship," Pet. App. 59a, is inconsistent with the Board's own statement of the premises on which Congress acted in enacting § 8(f) and thus fails in the most basic sense to meet the test of rational agency decisionmaking.

The Board recognized that the 1959 Congress crafted § 8(f) to fit the collective bargaining system fostered by the NLRA into the following unique characteristics of the construction industry:

First, since the Board did not take jurisdiction over the construction industry until 13 years after the NLRA was passed it "had become established practice in the construction industry for employers to recognize and enter into collective-bargaining agreements with a construction industry union for periods ranging from 1 to 3 years even before any employees had been hired. S. Rep. 1 Leg. Hist. 423." Pet. App. 66a.[4] While "the Board had found unlawful the bargaining, referral, hiring, and employment practices common in the industry," Pet. App. 67a, the 1959 Congress regarded those practices as desirable and worthy of preservation because the industry pattern is essential to meet the needs of industry employees who wish to engage in collective bargaining as well as the needs of industry employers who must, e.g., "know [their] labor costs before making the estimate

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[4] The Board decision uses the form "S.Rep." and "Leg. Hist." to refer to S. Rep. No. 187, 86th Cong., 1st Sess. (1959) and to the NLRB, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 (G.P.O. 1959) and we incorporate the Board's form herein.

upon which [their] bid will be based . . . ," Pet. App. 66a quoting S. Rep., 1 Leg. Hist. 424.

Second, Congress recognized, too, that in "construction, an employee or group of employees 'typically works for many employers and for none of them continuously. Jobs are frequently of short duration, depending on various stages of construction.' S. Rep., 1 Leg. Hist. 423. . . . [B]ecause of the short and sporadic periods of employment typical to the industry, '[r]epresentational elections in a large segment of the industry are not feasible,' S. Rep., 1 Leg. Hist. 451-452." Pet. App. 66a-67a.

And, *third*, Congress recognized that "[a] substantial majority of the skilled employees in [the construction] industry constitute a pool of . . . help centered about their appropriate craft union," Pet. App. 66a, quoting S. Rep., 1 Leg. Hist. 424, and that " '[i]f the employer relies upon this pool of skilled craftsmen, members of the union, there is no doubt under these circumstances that the union will in fact represent a majority of the employees actually hired.' S. Rep., 2 Leg. Hist. 424." Pet. App. 71a.

Given Congress' premises in enacting § 8(f), two conclusions follow ineluctably.

(1) Congress recognized that "[r]epresentational elections in a large segment of the industry are not feasible." Thus requiring a construction industry union to obtain a Board certification after a representation election (or its equivalent, employer recognition based on proof of a majority among the employer's current employees) in order to secure full exclusive representative status frustrates Congress' intent in enacting § 8(f).

(2) Congress recognized that a pre-hire agreement between an employer and a construction industry union which results in the employer hiring from the skilled pool of craftsmen centered about that craft union to be *as*

reliable an indicator that the union is the employees' chosen collective bargaining representative as a certification after a representation election in other industries covered by the Act; as the 1959 Senate Report put it, "there is no doubt under these circumstances that the union will in fact represent a majority of the employees actually hired." Again the failure to recognize as much frustrates Congress' intent in enacting § 8(f).

The Board has nonetheless laid down a *per se* rule that a construction industry union can obtain full exclusive bargaining representative status—with all the rights and privileges of that status—*only* if the union is certified after a Board-conducted representation election or is voluntarily recognized by the employer on the basis of proof of majority among the employer's current employees. Pet. App. 59a; 84a.

Absent such a certification or recognition, at the expiration of a § 8(f) agreement, the decision below grants the signatory employer the unfettered option to refuse to deal with the signatory union *without regard to the length of their prior relationship and without any basis for doubting the particular union's majority status.* Granting employers such an option cuts deeply against the NLRA policy of "channeling conflict between labor and management," *First National Maintenance Co. v. NLRB*, 452 U.S. 666 (1981), as a means of minimizing industrial strife. Furthermore, the Board's decision *strips the union, and the employees the union represents, of the right to strike or picket in an effort to secure a successor agreement.* Doing so is equally inconsistent with the Act's emphases on "equalizing the bargaining power of the employee with that of his employer," *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 835 (1984).

Plainly then the Board's conclusion that recognition through a § 8(f) agreement is *never* a sufficient basis for full exclusive representative status is at war with

Congress' premises in enacting § 8(f) as the Board itself restated those premises. As we have seen, the legislative effort that produced § 8(f) was not aimed solely at making certain types of contracts enforceable for their term; § 8(f) rests on the premise that the usual processes for obtaining full exclusive representative status—the very process the Board here has required construction industry unions to invoke—are *not* practicable in this industry and that alternative means for obtaining that status are required. Driving construction unions back to the Board's election processes in this way makes a mockery of the legislative process as it unfolded in 1959.

The Board offered a single justification for the anomaly its decision creates:

> If, . . . a union acquires full 9(a) status based . . . on the employer's adoption of an 8(f) agreement . . . the signatory union . . . could lawfully seek to compel the employer, through strikes or picketing, to negotiate and sign a successor agreement. This would be directly contrary to the express congressional mandate that an employer cannot be coerced, through strikes or picketing, into negotiating or adopting an 8(f) agreement.[39]

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[39] The Conference Report on the 1959 amendments, see 2 Leg. Hist. 934, 946, states that "[n]othing in [Section 8(f)] is intended . . . to authorize the use of force, coercion, strikes, or picketing to compel any person to enter into such [8(f)] agreements."

[Pet. App. 80a-81a.]

The NLRA, as this Court has noted, embodies a "Congressional concern about coerced designations of bargaining agents," *NLRB v. Iron Workers*, 434 U.S. 335, 347 (1978) (*Higdon Construction Co.*); for that reason, § 8(b)(7) of the Act strictly limits the use of "economic weapons to force recognition from an employer," *id.* at 346. But once a bargaining relationship is established, the Act allows for the free play of economic forces as "part and parcel of the process of collective bargaining."

Labor Board v. Insurance Agents, 361 U.S. 477, 494 (1960).

The legislative history respecting the use of economic force to secure a § 8(f) agreement must be understood in this context. As the Board itself recognized in its earliest decisions under § 8(f), what concerned the 1959 Congress was the use of economic coercion as part of "an *initial* attempt by a union and an employer in the construction industry to commence . . . a [bargaining relationship]." *Bricklayers Local 3*, 162 NLRB 476, 478 (1966) (emphasis added). Senator Kennedy made this explicit in the very statement that establishes the congressional intent to preclude union coercion: "The purpose of this section is to permit voluntary prehire agreements. *This is because of the inability to conduct representation elections in the construction industry.*" 2 Leg. Hist. 1715.

In § 8(f), Congress thus sought to assure that construction industry employers would be free to enter, or not enter, a prehire agreement in the *same* way—and to the *same* extent—that employers in other industries were (and are) free to decide whether to extend voluntary recognition to a union. There is no hint in the legislative materials that Congress sought to insulate construction industry employers from economic pressure respecting the terms of *successor* agreements, any more than any other employer who extends voluntary recognition to a union is insulated from such pressure in negotiations for successor agreements.

Thus, on examination, the Board's purported justification of its *per se* rule that "upon the expiration of [§ 8(f)] agreements, the signatory union will enjoy no presumption of majority status, and either party may repudiate the § 8(f) relationship," Pet. App. 59a, turns out to provide no justification at all for that rule.[5]

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[5] Given the importance of employee free choice in the NLRA scheme we hasten to note that the Board does not—and could not

CONCLUSION

For the above stated reasons this petition for a writ of certiorari should be granted if the *certiorari* petition in the connected case of *John Deklewa, et al. v. NLRB, et al.*, No. 88-70, is granted.

Respectfully submitted,

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—claim that the rule we challenge here protects employee rights. Indeed, as the Board itself points out in another part of the decision below:

> A rule granting unilateral repudiation rights to an employer who voluntarily enters a collective-bargaining agreement is not a necessary predicate for advancement of the employee free choice principles embodied in [§ 8(f)'s] second proviso. . . . [A]n employer's decision to repudiate may be based on the employer's own economic considerations, without reference to or concern for the employee's desire to continue the status quo. Even if the employer has a legitimate question as to its employees' representational desires, Congress has expressly provided an electoral mechanism for testing them. [Pet. App. 74a.]